United States Court of Appeals

for the Second Circuit

APPENDIX

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P/r

75-2022

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
WILLIAM H. BANKS,

Appellant,

-against-

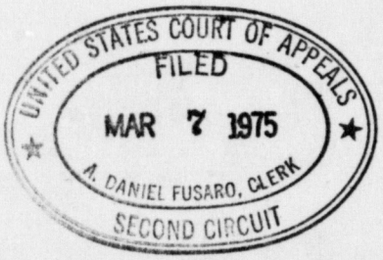
ROBERT J. HENDERSON, et al.,

Appellees.

Docket No. 75-2022

APPENDIX

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
DENYING A WRIT OF HABEAS CORPUS



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NITED STATES DISTRICT COURT

JUDGE FRANKEL PRO SE

Jury demand date:

74 CIV 388

Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
.S.A. ex rel., WILLIAM H. BANKS	For plaintiff: William H. Banks Box 618 Auburn. N.Y. 13022
-V-	
OBERT J. HENDERSON, SUPT. AUBURN ORRECTIONAL FACILITY	For defendant: Richard H. Kuh District Attorney- N.Y. County

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB
.S. 5 mailed X	Clerk					
S. 6 mailed ✓	Marshal					
Basis of Action: RIT OF HABEAS CORPUS 28 USC 2241	Docket fee					
	Witness fees					
Action arose at:	Depositions					

PRO

74 CIV. 33

DATE	PROCEEDINGS
Sep.9.74	Filed Petition for a writ of habeas corpus.
Sep.9.74	Filed order granting petitioner to proceed in forma pauperis, Conner, J.
Oct.2,74	Filed respondent's affidavit in opposition to petitioner's application for a writ of habeas corpus.
Oct.2,74	Filed respondent's memorandum of law.
Oct.22,74	Filed petitioner's affidavit of reply.
Oct.29.74	Filed notice of assignment to Frankel, J.
Nov. 6-74	Filed Memorandum-Order- the petitioner demands, inter alia , that the respondent make available to the court, for consideration on the petition, transcripts of petitioner's Huntley and Wade hearings, etc. as indicated. After these have been studied, the court will proceed as promptly as possible to determine whethera hearing or other relief sought by the petitioner should be granted. So ordered- FRANKEL, J. (m/n) (CT
Nov. 19-74	Filed Memorandum- OPINION # 41454 and ORDER- For reasons stated in opinion- the petition is denied. So ordered- FRANKEL, J. (m/n) (CT
Dec. 16-74	Filed Memorandum- the petitioner having filed his notice of appeal dated 12-6-74, this court hereby grants a certificate of probable cause pursuant to Fed. R. App. P. 22 (b) FRANKEL, J. 9m/n) (CT

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

BY [signature]
Deputy Clerk

(3)

WA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA ex rel. :
WILLIAM H. BANKS, :
: #41454
Petitioner, :
:
-against- :
:
ROBERT J. HENDERSON, etc., :
: MEMORANDUM
Respondent. : PRO SE 74 Civ. 3882
:

- x

FRANKEL, D.J.

In the spring and early summer of 1964, a number of elderly people were brutally beaten and robbed in Manhattan upon returning to their homes and offices from visits to banks. In the mid-summer, petitioner was arrested for, and then confessed to, these crimes. When one of the victims died shortly thereafter, petitioner was indicted for murder and several counts of robbery. On October 19, 1965, he was sentenced (as a second felony offender) to serve 20 to 30 years in prison upon his plea of guilty to voluntary manslaughter.

As will appear, petitioner's full confessions were not questioned until some years later. However, he attacked his sentence in state habeas on the ground that

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he had not been apprised prior to his guilty plea of the maximum sentence he might receive as a second felony offender. The attack prevailed. The sentence on the guilty plea was set aside in May 1968. That nisi prius determination was affirmed on appeal.

Proceeding in 1971 to trial upon the indictment, petitioner for the first time assailed the validity of the confessions he had given some seven years earlier. He protested the lack of warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), decided long after the confessions and guilty plea. Beyond that, he urged that the confessions had been involuntary so that their use in evidence would violate due process. As to this, the state trial court conducted an extensive evidentiary hearing following which it concluded:

> "That the People have proven beyond a reasonable doubt the defendant knowingly, intelligently and voluntarily made the statements attributed to him and such statements may be introduced at the trial."

Questions as to his confessions and others ruled against petitioner by the state courts are now presented here as grounds for federal habeas corpus.

For reasons now outlined, this court resolves each of these questions against the petitioner.

1. Petitioner acknowledges that under Jenkins v. Delaware, 395 U.S. 213 (1969), the rule of Miranda v. Arizona need not be satisfied in a post-Miranda retrial where a pre-Miranda trial resulted in a conviction which was nullified by appellate or other review proceedings. Here, petitioner argues, there was no prior trial, only a sentence upon a guilty plea. But the principle of Jenkins v. Delaware is squarely applicable none the less.

> "What is determinative is that the defendant is being tried for the same conduct that was the subject of a previously reversed conviction." 395 U.S. at 222 n.10.

The guilty plea and conviction thereon do not differ from a trial in the centrally pertinent sense that the "investigation was closed years prior to a retrial because law enforcement officials relied in good faith upon a strongly incriminating statement, [which, but for the guilty plea, would have been] admissible at the first trial, to provide the cornerstone of the prosecution's case." Id. at 220. A number of cases support this conclusion. United States v. Kienlen, 415 F.2d 557 (10th Cir. 1969); Ex parte Perry, 455 S.W.2d 214 (Tex. Crim.Appeals 1970); State v. Belgard, 25 Utah

2d 188, 479 P.2d 344 (1971). See also Commonwealth v. Savage, 214 Pa. Super. 460, 257 A.2d 654 (1969). No cases were cited in the state courts - and this court has discovered none - to the contrary.

2. Petitioner renews here the argument that his incriminating statements should have been excluded, even apart from the Miranda rule as such, for involuntariness. He appears to rely mainly upon state-law contentions, rejected in the state courts, centering upon the nine hours he was detained before completing a long series of confessions, including some (according to the prosecution's evidence) relating to crimes of which his interrogators had not been aware. He also argues, quite properly, that the things of which he was and was not advised may be considered as factors in the totality of circumstances from which voluntariness vel non is to be determined. While this point of the presentation is vague and dubious as a federal subject, this court has ordered up and reviewed the transcript of the state hearing leading to the finding of voluntariness beyond a reasonable doubt. Having completed that scrutiny, this court is entirely unable to say that the state hearing was not full, fair, and adequate in all respects, or that the state court's ruling is not amply sustained by the evidence adduced

before it. There were, to be sure, credibility issues. But there is no basis upon which this court should, or properly could, reconsider those findings or hear again the evidence to which they relate. See Townsend v. Sain, 372 U.S. 293, 313 (1963).

3. Petitioner actually had two trials in 1971, the first ending in a mistrial when a juror took ill during deliberations. At the first trial, a 76-year-old man testified to facts showing him to have been one of the petitioner's victims. At the second trial, testimony of this witness's son and representations of the prosecutor established that the elderly gentleman was ill in Florida and not in a condition to travel safely. No effort was made to question the asserted facts, but the use of this witness's prior testimony at the second trial was resisted by the defense. The allowance of the testimony, contrary to petitioner's arguments, appears to have been reasonable and proper. It presents no federal question of substance.

4. Pretrial identifications were suppressed on due process grounds though there was evidence to support claims that the identifications had been valid and reliable. Defense counsel proposed then to argue in summation that there had been no lineup. This assertion, obviously not in the

evidence before the jury, would have given a distortingly incomplete account. While forbidding it, the trial judge allowed full argument as to the absence of identification evidence at the trial. The result appears to have been entirely fair and sensible. Petitioner's complaints on this score raise no substantial question under the Federal Constitution.

5. There is, finally, an issue said to arise under the best-evidence rule. Whether it does, as petitioner says, or does not, as respondent says, is not a matter of moment. Either way, it is not a topic for federal habeas.

The petition is denied.

So ordered.

Dated: New York, New York
November 19, 1974

Marvin E. Frankel
U.S.D.J.

CERTIFICATE OF SERVICE

I certify that a copy of this notice of brief and appendix has been mailed to each of the following:

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E. Thomas Boyle

New York, New York
March 7, 1975